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MICHAEL RUDAK, JR., CLERK

No. 76-124

In the Supreme Court of the United States

OCTOBER TERM, 1976

MANUEL FEDERICO MADRID, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

ROBERT H. BORK,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner contends that the checkpoint at which his automobile was stopped for brief questioning of the occupants was not a permanent checkpoint and was not reasonably located.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of illegally transporting aliens, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals initially affirmed (Supp. Pet. App. A; 510 F. 2d 554) but later granted rehearing for the purpose of remanding the case to the district court for an evidentiary hearing and for further consideration of recent decisions of this Court (Supp. Pet. App. B; 517 F. 2d 937). After a hearing on remand, the district court found

that the stop of petitioner's vehicle occurred at a reasonably located, "fixed and permanent" Border Patrol checkpoint and that the stop and questioning of petitioner and his passengers were therefore reasonable (Tr. 45). The court of appeals again affirmed (Pet. App. A; 531 F. 2d 1329).

On January 19, 1974, petitioner's automobile was stopped at a Border Patrol checkpoint in New Mexico for a routine check of the occupants' citizenship. Petitioner claimed American citizenship. The agents determined, however, that two women passengers were Mexican citizens present in this country unlawfully.

Petitioner concedes, as he must, that stops for questioning may be made at reasonably located permanent checkpoints even in the absence of any particularized suspicion (Pet. 12). *United States v. Martinez-Fuerte*, No. 74-1560, decided July 6, 1976. He contends, however, that the place at which he was stopped was not a permanent checkpoint and was not reasonably located. The contrary findings of both courts below are amply supported by the record, and further review is not warranted.

The checkpoint was located in New Mexico on Highway 70-82,¹ 22.2 miles east of the intersection at Las Cruces of Highway 70-82 and north-south Interstate Route 25 (Tr. 8, 13).² The area between Las Cruces and the checkpoint is sparsely populated, containing only several mobile-home parks and a small town of about 2,000 per-

¹See map, Pet. App. B.

²The Border Patrol ceased to maintain the checkpoint involved here after May 1974, when another checkpoint on the same road assumed full-time responsibility for the traffic on Highway 70-82 (Tr. 25-26).

sons (Tr. 14, 34). No paved thoroughfare intersects the highway between Las Cruces and the checkpoint (Tr. 14), although the exit for the White Sands Missile Range is about two miles west of the checkpoint. The checkpoint location is about 46 air miles from the international border with Mexico (Tr. 10, 13-14).

Travelers driving east from Las Cruces were warned by three permanent signs that they would be required to stop ahead. Every vehicle approaching the checkpoint was stopped (Tr. 6, 8). The checkpoint included a pull-off area 300 feet long and 40 feet wide, which accommodated five lanes of traffic. There were two restrooms and a small building; floodlights were mounted on two permanent power poles (Tr. 9). During the time the checkpoint was in operation, rubber cones were placed on the highway to divert all traffic through the checkpoint (Tr. 16).

The checkpoint was operated eight hours per day, every day of the week,³ in tandem with another checkpoint further along Highway 70-82 at Alamogordo. The Alamogordo station operated 16 hours per day (Tr. 10). Other checkpoints on Interstate 25 and Highway 54 were maintained to intercept traffic along the major roads that run in a northerly direction from the border at El Paso (see map, Pet. App. B; Tr. 11, 18, 37).

From this brief summary it is apparent that substantial evidence supports the district court's finding that petitioner was stopped at a permanent checkpoint. Nothing in the record contradicts the district court's finding that

³Approximately once every two or three days, the Border Patrol would relinquish the checkpoint to the Military Police for about one half hour so that all traffic could be stopped during missile firings. The facility was originally built by the Military Police for this purpose (Tr. 17, 35).

the checkpoint was reasonably located. "[T]he choice of checkpoint locations is an administrative decision that must be left largely within the discretion of the Border Patrol * * * ." *United States v. Martinez-Fuerte*, *supra*, slip op. 19, n. 15. Like the San Clemente checkpoint at issue in *Martinez-Fuerte*, the checkpoint here satisfies each of the criteria prescribed by the Border Patrol to assure the effectiveness of checkpoints (slip op. 9-10, 19, n. 15).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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